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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

MAR - 1 1995  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Amendment of Part 90 of the Commission's ) PR Docket No. 93-144  
Rules to Facilitate Future Development of ) RM-8117, RM-8030,  
SMR Systems in the 800 MHz Frequency Band ) RM-8029

and

Implementation of Section 309(j) of the )  
Communications Act — Competitive Bidding ) PP Docket No. 93-253  
800 MHz SMR )

To: The Commission

REPLY COMMENTS

Thomas Luczak ("Luczak"), by his attorneys, hereby respectfully submits his Reply Comments regarding the above-captioned matter. In support of his position, Luczak shows the following:

Competing Interests Must Be Balanced

In its *Further Notice of Proposed Rulemaking*, the Commission proposed radical changes to the existing SMR licensing scheme which will affect all existing and future SMR licensees. Accordingly, the impact of these changes must be examined from the perspectives of all affected parties. However, by its Notice, the Commission seems to have given great consideration to the position of potential wide-area licensees, such as Nextel, while virtually overlooking and ignoring the position of existing licensees, who staunchly oppose the proposed changes. Thus, the Commission's Notice has had the

effect of tipping the scales rather than balancing them, and Luczak reiterates the need to create a balanced and level playing field for the competing interests in this matter at the outset, so that the ultimate outcome will be fair to all concerned.

In his comments, Luczak argued that the Commission had incorrectly and unfairly placed the burden of proof in this matter on existing SMR licensees, and that the burden of proof associated with implementing such sweeping changes lies not with the numerous opponents of change, but rather with its few proponents. Luczak suggested that the Commission instead require those favoring implementation of the proposed rules to provide clear, convincing, and conclusive evidence that the revised SMR licensing system is not only viable, but also necessary and justified. To date, however, none of the commentators who have advocated the Commission's proposed changes to the SMR licensing scheme have come close to demonstrating that the new SMR licensing is even feasible, let alone needed, justified or practical. The Commission cannot in good conscience act on invisible evidence and ignore the rights of existing licensees, all of whom have relied on and faithfully abided by the SMR licensing rules that have existed for over twenty years. Accordingly, Luczak maintains that the Commission may not move forward with these changes, at least until such time as it receives and evaluates concrete evidence of their need, justification and practicality.

#### It Is Better to Be Safe Than Sorry

Over the years, traditional analog SMR licensing has encouraged and fostered the development and growth of hundreds of small businesses which satisfy the public's

demand for radio dispatch services, at an affordable cost. Moreover, the SMR industry of today serves the needs of hundreds of thousands of customers, many of whom are small businesses themselves, and all of whom are dependent on the services that SMR operators provide.

In 1991, however, the Commission was confronted with a request by Fleet Call, Inc. (now Nextel Communications, Inc.) for permission to create a wide-area ESMR system. In order to encourage success and growth in the marketplace, the Commission granted authorization for such a system, based in large part on Nextel's promise to build a land mobile system which improved spectrum efficiency, without the need for additional spectrum.<sup>1</sup> Additionally, the Commission granted a waiver of its rules to allow five years to construct,<sup>2</sup> thereby providing further incentive and opportunity for Nextel to succeed. However, there is no guarantee that the system will ever be constructed or operational and the neither the Commission nor Nextel have put forth any evidence that such a system is possible, let alone can and will be successful.

In its *Further Notice of Proposed Rule Making*, the Commission's proposed changes allowing for easy wide-area ESMR licensing rely entirely upon speculation of what might be possible through wide-area licensing, without any proof that such systems are viable. Thus, the Commission's decision to re-work and re-create the SMR licensing

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<sup>1</sup>Fleet Call, Inc., *Memorandum Opinion and Order*, 6 FCC Rcd. 1533 (1991), *recon. dismissed*, 6 FCC Rcd. 6989 (1991).

<sup>2</sup>Id.

system at this time is at best premature, and Luczak once again cautions that the Commission would do better to be safe than sorry. Rather than overhaul a regulatory scheme which has existed and proved successful for over twenty years, the Commission would do well to postpone implementing such major changes until after thoughtful review of the facts necessary to make a careful evaluation of the successes and benefits, if any, of wide-area ESMR systems. Therefore, until such time as Nextel's wide-area ESMR system is operational and successful, the Commission should refrain from implementing the changes proposed by the Notice.

#### Mandatory Frequency Swapping

The Commission has proposed the idea of forced frequency swapping to facilitate wide-area SMR licensing. However, Luczak submits that this will aid ESMR licensees at the expense of the existing, traditional SMR licensees who are the cornerstone of the SMR industry. Many have been a part of the SMR industry since its inception and are largely responsible for its success. Luczak and other licensees have spent time and money researching locations and frequencies, procuring licenses, and constructing their stations, all with the intent of providing radio communications services to the public for years to come. Moreover, many existing SMR licensees intentionally fashioned their systems in such a way that expansion, should it prove desirable, would be feasible and convenient, in accord with existing Commission rules.

Mandatory frequency swapping, however, will destroy the diligent efforts of these stalwart licensees. It would place an enormous and unfair burden on small operators,

such as Luczak, who will be forced to surrender their frequencies to the bigger operators of ESMR systems, and will be "compensated" with a frequency that has been deemed by the Commission to be a sufficient swap. At this point, there has been no showing on the part of the Commission or any of the commentators who support mandatory frequency swapping that fully comparable frequencies exist. Therefore, the Commission should reserve action until it can demonstrate to existing licensees that such spectrum is in fact available.

Even if the Commission is able to show that frequencies may be swapped in such a way that an existing licensee is provided with a sufficiently satisfactory alternate frequency, the Commission has failed to consider the additional burdens and problems associated with changing one's frequency. As Luczak stated in his earlier comments, the modification of licenses, notification to customers on the system, changing out and retuning, will cost the Commission and particularly the licensee a great deal of time and money. In addition, some customers may find the change out and retuning process to be inconvenient, and may elect to cancel their service altogether. Thus, the small or local operator faces the threat of lost business. The costs and burdens arising from mandatory frequency swapping, with respect to both time and money, are far too high to be imposed without concomitant benefit.

A mandatory frequency swap will likewise result in a stifling effect on the growth of small business. Small and local operators will have to earmark resources and profits to facilitating and accomplish frequency change, rather than re-investing them in growth

and development. The Commission claims to encourage the development of small businesses as one of its goals, however, a system of required frequency swapping will serve only to hinder the progress of small business.

### Remember the Public Interest

The Communications Act of 1934, as amended, requires the Commission to act "in the public interest, convenience, and necessity." Luczak, however, restates his earlier-articulated position that the Commission, by implementing its proposed redesign of the SMR regulatory scheme, would be doing the exact opposite. The Commission's revised SMR licensing system is clearly detrimental to existing licensees, particularly small and local operators, such as Luczak, and will benefit a only few at the expense of hundreds or thousands. It will serve only to uproot the very licensees who have made the SMR industry into what it is today, and, in the process, stifle the potential for future growth of their systems. Moreover, the Commission has unfairly shifted the burden of proof regarding this matter to the wrong parties. The Commission cannot possibly conclude that these actions would be in the public interest. The public is interested in dependable and affordable dispatch communications services. The public has neither expressed an interest in nor demanded ESMR service. On the contrary, it has unequivocally rejected it.

The Commission cannot rationally claim that the current rule making acts to serve the public interest. The public has spoken, and has summarily rejected the Commission's proposal. The Commission should respect the public's wishes, and be mindful of the

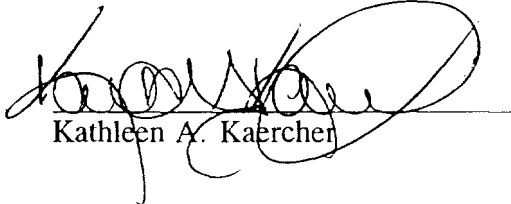
public's response in making its final determination. Only then will the Commission have fulfilled its mandate to act in public interest, convenience and necessity.

Conclusion

For all the forgoing reasons, the Commission should decline to adopt its proposed SMR licensing system since there exists no legal purpose or factual basis for adoption; and since adoption will cause substantial interest to the public and small businesses.

Respectfully submitted,  
THOMAS LUCZAK

By

  
Kathleen A. Kaercher

Brown and Schwaninger  
Suite 650  
1835 K Street, N.W.  
Washington, D.C. 20006  
202/223-8837

Dated: March 1, 1995

## CERTIFICATE OF SERVICE

I hereby certify that on this first day of March, 1995, I served a copy of the foregoing Reply Comments on the following by placing a copy in the United States Mail, first class postage prepaid:

Gardner, Carton & Douglas  
1301 K Street, N.W.  
Suite 900, East Tower  
Washington, D.C. 20005

Young & Jatlow  
2300 N Street, N.W.  
Suite 600  
Washington, D.C. 20037

Kelly & Povich, P.C.  
1101 30th St., N.W.  
Suite 300  
Washington, D.C. 20007

Counsel for:  
Pittencrief Communications, Inc.  
E.F. Johnson Company  
Gulf Coast Radio Fone  
Deck Communications, Inc.  
Nodak Communications  
Wiztronics, Inc.  
Raserco, Inc.  
Vantek Communication, Inc.  
Southern Minnesota Communications  
Brandon Communications, Inc.  
Dakota Electronics  
Bis-Man Mobile Phone, Inc.  
Rayfield Communications  
B & C Communications  
Radio Communications Center  
Keller Communication, Inc.  
Don Clark Radio Communications  
Pro-Tec Mobile Communications  
Automated Business Communication  
Morris Communications  
Nielson Communications  
E.T. Communications Company  
Bolin Communications System  
Diamond "L" Industries, Inc.

Counsel for:  
Ericsson Corporation

Lukas, McGowan, Nace & Gutierrez  
1111 19th Street, N.W.  
Washington, D.C. 20036

Counsel for:  
Fisher Communications, Inc.  
American Mobile Telecommunications Assoc.

Motorola, Inc.  
1350 Eye Street, N.W.  
Suite 400  
Washington, D.C. 20005

Counsel for:  
Advanced Mobilecomm, Inc.

Mintz, Levin, Cohn, Ferris, Glovsky, &  
Popeo, P.C.  
701 Pennsylvania Ave., N.W.  
Washington, D.C. 20004

Counsel for:  
McCaw Cellular Communications, Inc.

Blooston, Mordkofsky, Jackson & Dickens  
2120 L Street, NW  
Suite 300  
Washington, DC 20554

Counsel for:  
The SMR Small Business Coalition

Mark J. Golden  
Meyer, Faller, Weisman & Rosenberg, P.C.  
4400 Jennifer Street, NW  
Suite 300  
Washington, DC 20015

Wiley Rein & Fielding  
1776 K Street, NW  
Washington, DC 20006

Counsel for:  
Robert J. Butler

William R. Miller  
Russ Miller Rental  
3620 Byers Avenue  
Fortworth, Texas 76107

Counsel for:  
Personal Communications I

Joel Freedman  
Vice President, General Counsel  
Dial Call Communications  
1355 Peachtree Street, Suite 755  
Atlanta, GA 30309



Mark Lindquist  
Communications Center, Inc.  
Box 1034  
Pierre, SD 57501

Keller & Heckman  
1001 G Street, NW  
Suite 500 West  
Washington, DC 20001

Latham & Watkins  
1001 Pennsylvania Ave., NW  
Washington, DC 20004

John D. Pellegrin  
1140 Connecticut Avenue, N.W.  
Suite 606  
Washington, DC 20036

Counsel for:  
The Southern Company  
DCL Associates  
American Petroleum Institute  
US Sugar Corporation

Counsel for:  
Vanguard Cellular Systems  
Raymond B. Grochowski

Counsel for:  
American SMR Company

Duncan C. Kennedy  
Genesee Business Radio  
992 Cater Street  
Rochester, NY 14621-1910

Lewis H. Goldman  
1850 M Street  
Suite 1080  
Washington, DC 20036

Charles C. Townsend  
Atlantic Cellular Company  
15 Westminster St., Suite 830  
Providence, RI 02903

Counsel for:  
Douglas L. Bradley

Raymond J. Stone  
American Industrial & Marine Electronics, Inc.  
P.O. Box 715  
Dover, Delaware 19901

Meyer, Faller, Weisman  
& Rosenberg, P.C.  
Allan S. Tilles  
4400 Jenifer Street, NW  
Suite 380  
Washington, DC 20015

McCaw Cellular Communications, Inc.  
1150 Connecticut Avenue, NW  
Washington, DC 20036

John E. Sonneland  
Courtesy Communications  
W. 801 Fifth Ave.  
Suite 410  
Spokane, WA 99204

Counsel for:  
Parkinson Electronics

Bryan Cave  
700 Thirteenth Street, NW  
Suite 700  
Washington, DC 2005-3960

Michael R. Carper  
4643 South Ulster Street  
Suite 500  
Denver, CO 80237

Ross & Hardies  
888 16th Street, NW  
Suite 400  
Washington, DC 20006

Counsel for:  
CenCall, Inc.

Morrison & Foerster  
2000 Pennsylvania Ave., N.W.  
Suite 5500  
Washington, DC 20006

Counsel for:  
SMR Won

Fisher, Wayland, Cooper,  
Leader & Zargoza, L.L.P.  
2001 Pennsylvania Avenue, N.W.  
Suite 400  
Washington, DC 20006

Timothy P. Haley  
Centennial Telecommunication  
130 N. Bond Street  
Suite 201  
Bel Air, MD 21014

Industrial Telecommunications Association, Inc.  
Alliance of Private 800/900 MHz Licenses  
Frederick J. Day, Esq.  
1110 North Glebe Road  
Suite 500  
Arlington, VA 22201-5720

Cellular Telecommunications  
Industry Association  
Michael F. Altschul  
Vice President, General Counsel  
1250 Connecticut Avenue, N.W.  
Suite 200  
Washington, DC 20036

Association of Public-Safety  
Communications Officials International, Inc.  
Wilkes, Artis, Hedrick & Lawe, Chartered  
1666 K Street, N.W.  
Suite 1100  
Washington, DC 20006

Council of Independent Communication Suppliers  
Frederick J. Day  
Mark E. Crosby  
1110 N. Glebe Road  
Suite 500  
Arlington, VA 22201-5720

Organization for the Protection and  
Advancement of Small Telephone Companies  
Lisa M. Zgina, General Counsel  
21 Dupont Circle, N.W.  
Suite 700  
Washington, DC 20036

Dru Jenkinson, Inc.  
Bessozzi, Gavin & Cravn  
1901 L Street, N.W.  
Suite 200  
Washington, DC 20036

National Telephone Cooperative Assoc.  
David Cosson  
2626 Pennsylvania Ave., N.W.  
Washington, DC 20037

Spectrum Resources, Inc.  
A.C. Miller  
307 Annandale Road  
Suite 101  
Falls Church, VA 22042

Chadmoore Communications  
Keck, Mahin & Cate  
1201 New York Avenue, N.W.  
Washington, DC 20005-3919

Palmer Communications, Inc.  
Marianne H. Lepara  
12800 University Drive  
Suite 500  
Ft. Meyers, FL 33907-5333

Total Comm, Inc.  
William C. Wyatt, President  
2701 N. Van Buren  
Enid, OK 73703

Utilities Telecommunications Council  
Jefrey L. Sheldon, General Counsel  
1140 Connecticut Ave., N.W.  
Suite 1140  
Washington, DC 20036

U.S. Small Business Administration  
Jere W. Glover, Esq.  
409 3rd Street, S.W.  
Washington, DC 20416

Communications Unlimited, Inc.  
Lewis H. Goldman  
1850 M. Street, N.W.  
Suite 1080  
Washington, DC 20036

Nextel Communications, Inc.  
Robert S. Foosner  
800 Connecticut Avenue, N.W.  
Suite 1001  
Washington, DC 20006

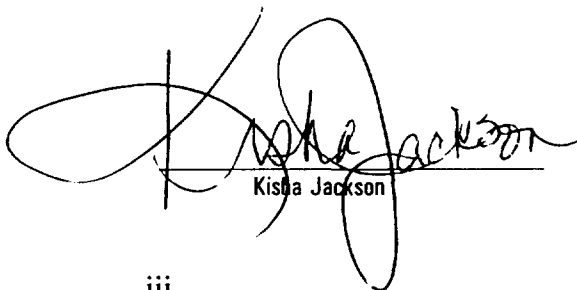
Telcelular de Puerto Rico, Inc.  
Law Offices of Richard S. Myers  
1030 15th Street, N.W.  
Suite 906  
Washington, DC 20006

Freedom Mobile Communication, Inc.  
Jerome M. Freund, President  
14 Ray Street  
Beaver Falls, PA 15010

Delta Communications, Inc.  
Kimo C. Chun, Director  
2646 Kilihau Street  
Honolulu, HI 96819

Southwestern Bell  
Linda M. Hood  
173330 Preston Road  
Suite 100A  
Dallas, TX 75252

Associated Public Safety Communications Officer, Inc.  
Wilkes, Artis, Hedrick & Lane, Chartered  
1666 K Street, N.W.  
Washington, DC 20006



Kisha Jackson